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No. 90-1846

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1992

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful although that finding was not made on facts judicially noticeable under Rule 201 of the Federal Rules of Evidence.

LIST OF PARTIES

When respondent filed his actions, petitioner George F. Denton was director of the California Department of Corrections, Eddie Ylst was superintendent of the California Medical Facility, and petitioner Paul J. Morris was warden of Folsom State Prison. The remaining petitioners were employees of the California Department of Corrections.

Respondent Mike Hernandez was and continues to be a prisoner confined within the California Department of Corrections.

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PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 929 F.2d 1374 (9th Cir. 1991) and is reprinted in the appendix to the Petition for Certiorari. The order of amendment filed by the Ninth Circuit on

April 10, 1991 and reproduced in the appendix makes certain corrections in the language of the opinion and denies a sua sponte request by a judge of the Ninth Circuit for an en banc hearing. The opinion was first published as Hernandez v. Denton, 919 F.2d 573 (9th Cir. 1990) and that opinion was superseded by the corrected 1991 opinion. The corrected opinion is referred to hereinafter as "Hernandez II".

This matter has been presented to this Court previously on petition for certiorari based upon an earlier decision of the Ninth Circuit, Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988), hereinafter "Hernandez I". This Court granted the petition and remanded the matter to the Ninth Circuit for further consideration in light of Neitzke v. Williams, 490 U.S. 319 (1989). Denton v. Hernandez, ___U.S.___, 110 S.Ct. 37 (1989). The instant opinion, Hernandez II, is the result of that remand.[1/]

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1. Further published opinions relating to Mr. Hernandez are Hernandez v. Ylst, 930 F.2d 714 (9th Cir. 1991) and Hernandez v. Whiting, 881 F.2d 768 (9th Cir. 1989). Other decisions without published opinions are Hernandez v. Whiting, No. 88-6743, 1991 U.S. App. LEXIS 3282 (9th Cir. Dec. 7, 1990); Hernandez v. Herndon, No. 89-55783, 1991 U.S. App. LEXIS 1886 (9th Cir. Feb. 4, 1991); Hernandez v. Ylst, No. 89-16386, 1990 U.S. App. LEXIS 16930 (9th Cir. Sept. 18, 1990); Hernandez v. Ylst, No. 88-15352, 1989 U.S. App. LEXIS 17719 (9th Cir. Nov. 21, 1989); Hernandez v. McCarthy, No. 88-15366, 1989 U.S. App. LEXIS 9110 (9th Cir. June 2, 1989); Hernandez v. Whiting, No. 85-6171 (9th Cir. Dec. 15, 1986); and Hernandez v. Denton, No. 84-2800 (9th Cir. Aug. 13, 1986).

JURISDICTION

The Ninth Circuit rendered its opinion and a timely petition for certiorari was filed on May 30, 1991. Certiorari was granted on November 4, 1991. Denton v. Hernandez, ___U.S.___, 1991 U.S. LEXIS 6468 (Nov. 4, 1991). This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (d) of 28 U.S.C. 1915, related to proceedings in forma pauperis. That section is as follows:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Prior to 1986, respondent, a state prisoner proceeding pro se, had filed numerous civil rights complaints pursuant to 42 U.S.C. section 1983.[2/] Five

complaints were related upon order of the district court on February 1, 1985. On April 17, 1986, the magistrate of the United States District Court for the Eastern District of California filed findings and recommendations that these complaints be dismissed pursuant to 28 U.S.C. section 1915(d). On May 5, 1986, the district court entered judgment against respondent. Hernandez I, 861 F.2d at 1422. Respondent appealed the dismissal of three

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2. The following are the cases listed by respondent as his in his complaint in No. S-85-0084 RAR:

Case Nos.	Filed	Decision Rendered
S-83-0645 LKK	06/15/83	
S-83-0917 MLS	08/17/83	*Dismissed* 9/29/84
S-83-0989 RAR	08/31/83	
S-83-1348 LKK	11/08/83	
S-84-0098 EJG	01/20/84	
S-84-0808 LKK	06/22/84	*Dismissed* 7/16/84
S-84-1074 LKK	08/20/84	
S-84-1311 RAR	10/12/84	
S-84-1198 MLS	09/17/84	
S-84-1608 EJG	12/05/84	

There is a notation on a July 14, 1985 letter from respondent to the Ninth Circuit in the record in what appears to be a clerk's hand. The notation lists another case, No. S-84-1317 MLS. The cases dismissed by the district court in the instant case are: Nos. S-83-0645 LKK; S-83-1348 LKK; S-84-1074 LKK; S-84-1198 MLS; and S-85-0084 RAR. Of these cases, respondent appealed Nos. S-83-0645 LKK, S-83-1348 LKK, and S-85-0084 LKK.

of the five cases, and these three were at issue in the Hernandez opinions and are now before this Court.

The various allegations in these complaints are set out in some detail in the dissent to the Ninth Circuit's 1988 decision. Hernandez I, 861 F.2d at 1433-1438, see also 1422. The allegations pertinent to the issues before the Court are that respondent was raped about 28 times over a period of more than two years in two separate prisons without once being conscious of the assaults at the time that he was being raped. Respondent claimed that these assaults occurred at Folsom Prison and the California Medical Facility and were committed by both inmates and correctional officers. He had no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs. Respondent had been diagnosed as requiring psychiatric treatment and has been a patient at the Atascadero State Hospital, a state mental institution. Hernandez I, 861 F.2d at 1436-1438; Hernandez II, 929 F.2d at 1377.[3/]

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3. The transcript of Mr. Hernandez's own version of assaults similar to those alleged in the instant case is contained in a published opinion issued on April 10, 1991, the same day that Hernandez II was issued in final form. Hernandez v. Ylst, 930 F.2d at 715 n.1, and 717 n.4. Mr. Hernandez, on habeas corpus after a state court criminal conviction, sought to have the conviction overturned because the trial court did not institute proceedings to determine his competency to stand trial.

Id. at 716. The Ninth Circuit ruled that there was no substantial doubt of competency. Id. at 718. Inter alia, Mr. Hernandez cited his trial court statement regarding in-custody rapes as proof of his own incompetency. Id. at 717 n.4.

The "undeniably weird" allegations in the Ylst matter, (id. at 717 n.4), involved Mr. Hernandez being given heroin-loaded Tylenol in January, 1982. In addition, respondent alleged that there were needle puncture wounds on his body. On February 3, March 4 or 5, and April 24, he found other needle marks on his body. In addition, he found evidence of sexual abuse on his clothing in the first week of March and on April 10. Respondent concluded that he had been drugged every time he had found needle marks, and that he had been raped every time he had been drugged.

It is not clear that the events related by Mr. Hernandez in Ylst are the same as those alleged in his numerous cases. See id. at n.1. Not all of the complaints are in the record, but the earliest of the complaints involved in the instant case, No. S-83-0645 LKK, involved an alleged rape on July 29, 1982, the first day respondent was incarcerated in Folsom Prison. Because Mr. Hernandez was sentenced on June 14, 1982 (id. at 716) and was incarcerated in county jails prior to his trial, the correctional officers involved in the Ylst opinion were probably not state correctional officers. All the petitioners in the instant case are state correctional personnel and therefore it appears that the Ninth Circuit's conclusion that the alleged perpetrators in Ylst were the defendants in the Denton litigation is incorrect. Hernandez v. Ylst, 930 F.2d at 715 n.1. Given that Hernandez v. Whiting, 881 F.2d at 769, involved allegations that deputy sheriffs

On November 23, 1988, the Ninth Circuit reversed the district court and held, among other things, that the district court could not dismiss the rape allegations under section 1915(d). Hernandez I, 861 F.2d at 1427. The court held that a court may find a complaint "wholly fanciful" and without substance in law or fact only if the facts alleged are impossible in light of a judicially noticeable fact. Because the court would not take judicial notice that the alleged rapes did not occur, it would not dismiss the cases as frivolous. Id. at 1426-1427. The majority again concluded that even under Neitzke, an informa pauperis complaint can be dismissed under section 1915(d) as fanciful only if judicially unenforceable facts establish that plaintiff's allegations are impossible.

This Court vacated the 1988 opinion and remanded the matter for further consideration in light of Neitzke. Denton v. Hernandez, __U.S.___, 110 S.Ct. 37 (1989). The Ninth Circuit issued a second opinion, Hernandez II, on November 21, 1990. The majority also found, and the dissent agreed, that he alleged no facts capable of establishing that any of the named defendants assaulted him and the complaints could be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, but remanded the cases to the district court because it was "not yet apparent that [the] claims lack[ed] either legal or factual basis." Hernandez II, 929 F.2d at 1376-7.

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had drugged and beaten up respondent, and then locked him in an isolation cell for three days without clothing, water, or a mattress, it is not certain that the Ylst allegations refer to Whiting.

The Court of Appeals modified its opinion and denied en banc hearing on April 10, 1991.

SUMMARY OF ARGUMENT

The present decision, Hernandez II, incorrectly limits the power granted the district courts to dismiss a frivolous case under 28 U.S.C. section 1915(d), in that district courts within the Ninth Circuit must now base a section 1915(d) dismissal on facts subject to judicial notice under Rule 201 of the Federal Rules of Evidence. These facts must establish that a plaintiff's allegations are impossible. This is neither sound law nor consonant with this Court's 1989 remand of this case to the Ninth Circuit. Hernandez II does not comport with the intent of Congress in enacting section 1915(d) or the holdings in Neitzke and will adversely affect the ability of district courts to handle the growing problem of prisoner in propria litigation because, as a practical matter, it does not admit of any discretion in the District Court to dismiss a fantastic complaint as frivolous under section 1915(d).

ARGUMENT

THE NINTH CIRCUIT'S DECISION IN HERNANDEZ II IMPROPERLY LIMITS SECTION 1915(D) AND THIS COURT'S DECISION IN NEITZKE, CREATING AN ANOMALOUS RULE AMONG THE CIRCUITS WITH REGARD TO THE DEFINITION OF FRIVOLOUS LITIGATION

Neitzke dealt with an inmate civil rights action that was dismissed as frivolous under section 1915(d) only because it failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Neitzke v. Williams, 490 U.S. at 321. This Court issued certiorari to resolve a conflict among the circuits as to whether a complaint deficient under Rule 12(b)(6) is necessarily also frivolous under section 1915(d). Id. at 324 n.3. The Court, in a unanimous opinion by Justice Marshall, found that a complaint which fails to state a claim is not necessarily frivolous under section 1915(d). Id. at 331. This Court found two distinct lineages for the rules at issue. Rule 12(b)(6) requires a judgment against the plaintiff if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. If a district judge simply does not believe the factual allegations, no dismissal is authorized under Rule 12(b)(6).

Section 1915(d), as construed in Neitzke, does empower a court to disbelieve factual allegations. The

Court of Appeals would limit this power to reliance on facts which are subject to judicial notice under Rule 201 of Federal Rules of Evidence, and which establish that the allegations are impossible.

The intent of Congress in enacting section 1915(d) was to discourage the filing of, and waste of judicial and defendant resources upon, baseless lawsuits that paying litigants do not initiate because of the costs of bring suit and the sanctions for vexatious litigation. See, O'Connell v. Mason, 132 Fed. 245, 247 (1st Cir. 1904).

> Section 1915(d) has a separate function, one which molds rather differently the power to dismiss which it confers . . . . [T]he statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless . . . . Examples of the latter class are claims describing fantastic or delusional scenarios, claims which federal district judges are all too familiar. [Emphasis added.]

Neitzke v. Williams, 490 U.S. at 328. If a complaint lacks an arguable basis in law, dismissal under either section 1915(d) or Rule 12(b)(6) is proper. If the complaint raises an arguable legal question, "dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not." Id. at 328. "[F]rivolousness in the

section 1915(d) context refers to a more limited set of claims than does Rule 12(b)(6) . . . ." Id. at 329.

The Hernandez II opinion rejects the possibility that a dismissal for frivolity may be based on "law, human behavior, or permissible inferences" (Hernandez I, 861 F.2d at 1429) and arbitrarily and without authority adopts a standard more restrictive than that announced in Neitzke. In doing so, the Ninth Circuit failed to do what this Court ordered in 1989, i.e. to review Hernandez I in light of this Court's holdings in Neitzke. Instead, the Ninth Circuit issued an opinion which distorts Neitzke and evades the uniform and simple rules governing the interpretation of section 1915(d).[4/]

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4. With the exception of the Ninth Circuit's holdings in Hernandez I and Hernandez II, this Court was correct in stating there was general conformance to this Court's rulings among the circuits on this point. Neitzke v. Williams, 490 U.S. at 325. Although the various circuits' formulation of the frivolity test show some wording differences, all honor the principles outlined in Neitzke. In the case of those circuits which do not have a post-Neitzke decision on point, there is no indication of any intent to stray from Neitzke principles.

The District of Columbia Circuit has stated that "if a complaint has at least an arguable basis in law and fact -- if the complaint is viable -- it cannot be deemed frivolous." Brandon v. D.C. Board of Parole, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127. The First Circuit relies on a similar "facts and law" test. Castro v. U.S., 584 F.Supp. 252, 263 (D.P.R. 1984), *aff'd*. 775 F.2d 399 (1st Cir. 1985). In Nance v. Kelly, 912 F.2d 605, 606

(2d Cir. 1990), the Second Circuit held that dismissal is proper when the factual contentions are clearly baseless, such as those produced by delusion or fantasy, or where there is an indisputably meritless legal theory.

The Third Circuit utilizes a test phrased in terms of an indisputably meritless legal theory or clearly baseless factual allegations. Abdul-Akbar v. Wilson, 901 F.2d 329, 333 (3d Cir. 1990). The Fourth Circuit prohibits dismissal unless the plaintiff is not entitled to relief beyond a reasonable doubt under any arguable construction both in fact and law. Johnson v. Silvers, 742 F.2d 823, 824 (4th Cir. 1984). The Fifth Circuit states a dismissal is proper if the claim's realistic chance of ultimate success is slight or the claim has no arguable basis in law and fact. Vornado v. Collins, 920 F.2d 320, 321 (5th Cir. 1991).

The Sixth Circuit requires an arguable basis in law or rational factual assertions. Lawler v. Marshall, 898 F.2d 1196, 1198-1199 (6th Cir. 1990). The Seventh Circuit utilizes the rational argument test. Corgain v. Miller, 708 F.2d 1241, 1247 (7th Cir. 1983). The Eighth Circuit states that it must appear beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Smith v. Bacon, 699 F.2d 434, 436 (8th Cir. 1983).

The Ninth Circuit, with the exception of Hernandez I and Hernandez II, uses the arguable basis in law or fact test. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989). However, Jackson announced an anomalous de novo review standard on appeal.

The Tenth and Eleventh Circuits utiiize the arguable basis in fact or law test. Wiggins v. New Mexico State

On remand, the Ninth Circuit undertook the application of these Neitzke principles to the facts of the instant case. Hernandez II, 929 F.2d at 1376 states:

> The Supreme Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See, [Franklin v. Murphy, 745 F.2d 1227 (9th Cir. 1984)]. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez['s] allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal.

However, Hernandez II, as well as Hernandez I before it, interprets Neitzke to state that a claim cannot qualify as patently[5/] "delusional" or "hallucinatory" unless it rests

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Supreme Court Clerk, 664 F.2d 812, 815 (10th Cir. 1981), *cert. denied*, 459 U.S. 840; Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1990).

5. How "patent" came to modify "delusional" or "hallucinatory" with regard to section 1915(d) is unclear. Neitzke makes reference to a "patently insubstantial complaint" being liable to dismissal under Rule 12(b)(6)

upon facts which the court knows could not have occurred. The Ninth Circuit concludes that these foundational facts must be amenable to judicial notice under Rule 201(b) of the Federal Rules of Evidence.[6] Unless such contrary or countervailing foundational facts are known or capable of determination by reference to accurate sources, no case may be dismissed under section 1915(d) and Neitzke. Hernandez II, 929 F.2d at 1376; Hernandez I, 861 F.2d at 1426.

Framed in this fashion, the conclusion in the instant case was foregone. Because the Ninth Circuit could not "conclude that the plaintiff's claims of rape are contrary to any facts that are 'generally known' [or] ascertain the truth of the [plaintiff's] allegations by looking to any

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and not section 1915(d). Neitzke v. Williams, 490 U.S. at 327 n.6.

6. The genesis of this requirement is not detailed in Hernandez I or Hernandez II. Earlier Ninth Circuit cases permitted judicial notice but none required it. Conway v. Oliver, 429 F.2d 1307 (9th Cir. 1970); Williams v. Field, 394 F.2d 329 (9th Cir. 1968), *cert. denied*, 393 U.S. 891. Hernandez II does soften the holding of Hernandez I by making judicial notice "one useful standard" in the frivolity decision. However, Hernandez II is consistent with Hernandez I in reversing the dismissals because no judicial notice of contrary facts could be made. Hernandez II, 929 F.2d at 1376.

readily available, accurate source,"[7] the Court held that the district court had erred in dismissing the rape claims. Hernandez II, 929 F.2d 1374. Further, the Ninth Circuit rejected the concept that the aggregate of 28 rapes amounted to frivolity and stated (id. at 1376):

> If we were to affirm the district court's dismissal of all the claims as factually frivolous . . . , we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that

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7. The Ninth Circuit's own opinion, issued on the same day as the instant opinion and involving the same Mr. Hernandez (Hernandez v. Ylst, 930 F.2d 714), should have been susceptible of judicial notice in this case. That case involved Mr. Hernandez's assertion that his prior statement regarding in-custody rape was proof of his own incompetency. Id. This would seem to be a significant fact, readily determinable from an unimpeachable source, that could be taken into account when deciding whether "all 28 rapes" alleged in the Hernandez II complaint were delusional. Although Hernandez v. Ylst refers to the "amaranthine" Hernandez II suit, Hernandez II does not refer to the Ylst case. Moreover, there is no reasonable explanation why the Ninth Circuit's unpublished 1990 opinion involving Mr. Hernandez, Hernandez v. Whiting, No. 88-6743, would not also have provided some cognizable facts under the Hernandez II judicial notice rule. In Hernandez v. Whiting, the Ninth Circuit found frivolous Mr. Hernandez's contention that he was forced to eat food loaded with heroin.

> none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.[8/]

A considered examination of Neitzke reveals the Ninth Circuit's misinterpretation of that case. There is no authorization in Neitzke for the creation of a judicial notice rule for determining frivolity. Moreover, there is no hint that a wholly objective standard had to be used to determine frivolity. What is implicit in Neitzke is that district courts are permitted to exercise their discretion in determining when factual pleadings manifest "fantastic or delusional scenarios." Id. at 328.

The Hernandez II court would not dismiss the case unless an objective source could be found that positively established that Mr. Hernandez's 28 rapes could not have occurred. Indeed, no positive, objective fact could be found in other cases to counter fantastic allegations, such as that the plaintiff was the prophet Muhammed (Collins v. Henman, 676 F.Supp. 175, 176 (S.D. Ill. 1987)), or in communication with the Devil. U.S. ex rel. Mayo v. Satan

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8. This passage is somewhat opaque. Assuming that the opinion does not hold that an allegation of 28 rapes is 28 times more credible than an allegation of one, it appears that Ninth Circuit is stating that just because an absurd number of incidents are alleged, there is no means of determining that a minimum of one rape did not occur. This position eschews common sense and the experience of the district court bench.

and his Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971). The grafting of a judicial notice requirement upon Neitzke, de facto requires the district courts to render judgment on the merits of the case in a manner analogous to granting summary judgment, in that objective matter outside the record reference must be made to Rule 56(c) of the Federal Rules of Civil Procedure.

The discretion accorded to our trial courts in the light of human experience should be sufficient to disregard allegations so "hard to believe." Under the guise of reconciliation with Neitzke, the Ninth Circuit has eviscerated the clear holding of Neitzke and created its own idiosyncratic interpretation of section 1915(d).[9/]

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9. This holding is clearly grounded upon the Ninth Circuit's interpretation of section 1915(d), and the relief accorded respondent was reversal of the district court's dismissal of the claims. Hernandez II, 929 F.2d at 1377. In addition, there is dicta which indicates that respondent's claims failed to state a claim under Rule 12(b)(6) but "were not patently without legal substance." Id. at 1376. Moreover, the dissent states that the net effect of the reversal would be a remand for respondent to file an amended complaint. Id. at 1377 (Aldisert, J., dissenting). This implies that the Ninth Circuit understood that the complaints as they stood were not sustainable under Rule 12(b)(6). The Ninth Circuit observed, therefore, in a manner consistent with Neitzke, that a complaint may be deficient under Rule 12(b)(6), but not frivolous under section 1915(d). Neitzke v. Williams, 490 U.S. at 328-329.

Requiring the use of judicial notice means that district courts cannot utilize their discretion in this area and that a wealth of judicial experience cannot be brought to bear on any given complaint. The district courts should not have to cite scripture that certain allegations pass the bounds of rationality in order to find a complaint frivolous. Judgments should be made on experience. There is no mandate in Neitzke directing cumbersome and absurd mental gymnastics. Neitzke instead allows for the exercise of discretion by the district courts with regard to "fantastic or delusional scenarios, claims with which federal district judges are all too familiar." [Emphasis added]. Neitzke v. Williams, 490 U.S. at 328.

The situation in our trial courts is too grave to prohibit the exercise of considered discretion by district court judges. Justice Aldisert, in his Hernandez I dissent, stated the problem succinctly. The number of prisoner civil rights cases increased 1600 percent during the 20-year period ending in 1987[10/], and the number of these cases which were meritorious was very small, both proportionately and absolutely. Hernandez I, 861 F.2d at 1431 (Aldisert, J., dissenting) The existence of abusive

10. Some documentation of the proliferation of in propria persona litigation appears in Van Vort, *Note: Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 Fordham L. Rev. 1165 (1987); Feldman, *Indigents in the Federal Courts*, 54 Fordham L. Rev. 413 (1985); and Turner, *When Prisoners Sue*, 92 Har. L. Rev. 610 (1979).

litigants[11/] poses a danger to the functioning of any system of justice. As Judge Aldrich wrote in 1904 in O'Connell v. Mason, 132 Fed. at 247:

> It is quite clear that Congress, while intending to extend to poor and meritorious suitors the privilege of having their wrongs redressed without the ordinary burdens of litigation, at

11. A veritable honor roll of truly vexatious litigants may be formed after the briefest review of the annotations. Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986); Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986); In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984); In re Green, 669 F.2d 779 (D.C. Cir. 1981); Pavilonis v. King, 626 F.2d 1073 (1st Cir. 1980) *cert. denied*, 449 U.S. 829; Gordon v. U.S. Department of Justice, 558 F.2d 618 (9th Cir. 1977); Adams v. American Bar Assn., 400 F.Supp. 219 (E.D.Pa. 1975); Rudnicki v. McCormack, 210 F.Supp. 905 (D.R.I. 1962).

In addition, this Court has had occasion to deal with litigants of this stripe: Zatko v. California, ___U.S. ___, 1991 U.S. LEXIS 6501 (Nov. 4, 1991); In re Sindram, ___ U.S.___, 111 S.Ct. 896 (1991); In re McDonald, ___ U.S. ___, 109 S.Ct. 993 (1989).

This Court's plenary power to adjust its own procedures in the interests of justice was manifested in In re Amendment to Rule 39, ___U.S.___, 111 S.Ct. 1572 (1991). See, Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985) *cert. denied*, 475 U.S. 1018; O'Connell v. Mason, 132 Fed. at 245.

> the same time intended to safeguard members of the public against an abuse of the privilege by evil-minded persons who might avail themselves of the shield of immunity from costs for the purpose of harassing those with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings.

The interplay between these opposing goals is dealt with in Neitzke v. Williams, 490 U.S. at 326:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints.

This Court in Neitzke reiterated and approved the test announced in Anders v. California, 386 U.S. 738, 744 (1967). A district court must determine whether the complaint lacks an arguable basis in fact or law. This Court felt no need to elaborate further[12/] on this test and

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12. In addition to the nearly uniform definition of frivolity among the circuits (see ftn. 4, supra), the meaning of "frivolous" is plain and consistent "both in common and legal parlance". Neitzke, 490 U.S. at 329. Indeed, the first definition given in Webster's is "of little

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weight or importance: having no basis in law or fact." Webster's Third New International Dictionary (1961); Hernandez I at 1430.

The "frivolous" language appeared in the original version of the statute. 27 Stat. 252, ch. 209 (1892). Examination of contemporary Supreme Court cases yields a number of inferable synonyms for "frivolous" which are at one with that approved in Neitzke. E.g. Cornell v. Green, 163 U.S. 75, 80 (1896) ["wholly destitute of foundation"]; Nash v. Harshman, 149 U.S. 263, 264 (1893) ["wholly groundless"]; Metropolitan Nat. Bank v. Claggett, 141 U.S. 520, 525 (1891) ["easy of concession or refutation"]; Ex Parte Wall, 107 U.S. 265, 285 (1882) ["slight"]; Bates v. Clark, 95 U.S. 204, 205 (1877) ["sham"].

Another use of "frivolous" appears in federal jurisprudence. Bell v. Hood, 327 U.S. 678, 682 (1946) held that the actual validity of the claim asserted is irrelevant to the issue of whether the matter in controversy arises under the laws of the United States within the meaning of 28 U.S.C. section 1331(a). In that case the plaintiff had sought damages for alleged violations of the Fourth and Fifth Amendment by FBI agents. The trial court dismissed because it found that damages were not expressly authorized for such constitutional violations. This Court held that such a complaint, having been framed in terms of federal law, was within federal jurisdiction unless the claim was immaterial and made solely for the purpose of obtaining jurisdiction or where the claim was wholly insubstantial and frivolous. In a manner reminiscent of Neitzke, the Court differentiated between the fundamental jurisdictional question and whether a cause of action was stated for which the trial court could grant relief.

proceeded to hold that a complaint filed in forma pauperis is not automatically frivolous because it fails to state a claim. Neitzke v. Williams, 490 U.S. at 1834.

Hernandez II, by engrafting an exclusive judicial notice test upon Neitzke, eschews the simplicity of the Anders test as all other circuits have interpreted it, and ensures that no cases with outlandish factual allegations can ever be dismissed for frivolity.[13/] Rather than allowing a district court to "pierce the veil of the complaint's factual allegations," the Ninth Circuit has

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Chief Justice Rehnquist has criticized Bell as "one of the most cryptic in the recent history of this Court's jurisprudence" because of its lack of clarity regarding the screening process to be employed by trial courts. Yazoo County Industrial Development Corp. v. Suthoff, 457 U.S. 1157, 102 S.Ct. 1032, 1033 (1982) (Rehnquist, C.J., dissenting). This concern about the "differences among the Federal Courts of Appeals in deciding whether the federal question in a complaint is 'wholly insubstantial and frivolous' within the meaning of Bell" (id. at 1034) is the same as should be raised by the instant case.

13. The Ninth Circuit has in fact allowed exceptions to its own harsh rule, but, it appears, only in unpublished cases. Hernandez v. Whiting, No. 88-6743, another of Mr. Hernandez's cases, involved the alleged forced feeding of heroin-laced food. The Ninth Circuit found the Whiting case frivolous. Similarly, the Ninth Circuit found frivolous allegations that the government had made an inmate the experimental subject of gassing experiments. Morris v. FBI, No. 90-55813, 1991 U.S. App. LEXIS 1296 (9th Cir. Jan. 23, 1991).

removed all discretion with regard to frivolity based on factual allegations and has created conflict among the circuits as to a statute vitally important for the administration of the trial courts. This anomalous opinion should be reversed.

CONCLUSION

Contrary to the plain meaning of Neitzke, the decision in Hernandez II places unwarranted restrictions upon the discretion of the district courts in dismissing actions under section 1915(d). Hernandez II does not conform to the spirit or letter of this Court's 1989 remand order, and the opinion must be reversed in order to ensure that this Court's mandates are obeyed in a uniform manner by all the circuits.

DATED: December 10, 1991

Respectfully submitted,

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STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On December 12, 1991, I served the attached **Petitioner's Brief on the Merits** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Subscribed and sworn to before me this 12th day of December 1991.

Rosalind Lender
Notary Public in and for said County and State

ROSALIND LENDER
NOTARY PUBLIC-CALIFORNIA
COUNTY OF SACRAMENTO
My Commission Expires March 14, 1995